UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 8

Docket No. CH-844E-10-0886-I-1

Terry Cummins,

Appellant,

v.

Office of Personnel Management,

Agency.

January 27, 2012

Brad Harris, Esquire, Lexington, Kentucky, for the appellant.

Camela Green-Brown, Washington, D.C., for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mary M. Rose, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of the initial decision that sustained the decision of the Office of Personnel Management (OPM) denying the appellant's application for disability retirement under the Federal Employees' Retirement System (FERS). For the reasons set forth below, we AFFIRM the initial decision as modified and SUSTAIN OPM's reconsideration decision.

BACKGROUND

¶2 The appellant, a rural letter carrier, applied for FERS disability retirement on October 9, 2009, claiming that she suffered from anxiety, depression, stress, hives, headaches, nausea, and a "nervous [b]reakdown." Initial Appeal File (IAF), Tab 5, Subtab II-D at 1. OPM denied her application, finding that there was insufficient documentation "to show disabling medical conditions for a period of one year or more" and that the evidence did not support the conclusion that her condition warranted accommodation in her current position or reassignment to another comparable position. *Id.*, Subtab II-C at 2-3. OPM's reconsideration decision affirmed, finding that the medical evidence did not establish a medical condition of the severity to prevent the appellant from performing in her position, that she failed to establish that her medical conditions were incompatible with useful or efficient service or retention in her position, and that she failed to demonstrate that accommodation or reassignment was warranted because she failed to establish that she had a disabling medical condition. *Id.*, Subtab II-A at 2.

¶3 In her appeal, the appellant claimed that OPM did not properly consider her medical documentation, and she submitted additional information supporting her claim. IAF, Tab 1 at 4, Tab 6 at 14-15. After a telephonic hearing, the administrative judge affirmed OPM's decision to deny disability retirement benefits, finding that the appellant failed to demonstrate that her depression and anxiety precluded her from performing useful and efficient service as a rural letter carrier. IAF, Tab 12, Initial Decision (ID) at 19. The administrative judge also found that the appellant failed to submit any medical evidence demonstrating that she was diagnosed with or treated for hives, headaches, and nausea, either separately or in conjunction with her treatment for her depression and anxiety. ID at 17. Finally, the administrative judge found that the appellant did not meet her burden of establishing the extent to which her depression and anxiety disorders could or could not be controlled by appropriate treatment. ID at 19.

¶4 The appellant has filed a petition for review challenging several of the administrative judge's factual findings and legal conclusions. Petition for Review (PFR) File, Tabs 1, 3. She has attached additional medical documentation, most of which she is submitting for the first time on review. PFR File, Tab 1 at 27-102. OPM has not responded.

ANALYSIS

¶5 On review, the appellant challenges the administrative judge's finding that the medical documentation submitted below was sparse, and she argues that the administrative judge failed to give appropriate weight to the medical opinions of Dr. Patrick Renick, her primary care physician, and Dr. Nicole Noble, her therapist. Contrary to the appellant's assertions, however, the administrative judge thoroughly examined the record and made explained findings consistent with the evidence submitted below, and the appellant's arguments do not provide a basis for reversal of the initial decision.

¶6 The appellant makes various other challenges to the initial decision that either constitute mere disagreement with the administrative judge's findings or are simply not material to the outcome. *See Yang v. U.S. Postal Service*, 115 M.S.P.R. 112, ¶ 12 (2010); *Neice v. Department of Homeland Security*, 105 M.S.P.R. 211, ¶ 10 (2007). For example, although the appellant correctly argues that the cause of the "single incident" that triggered her anxiety and depression is irrelevant, any mention of the incident in the initial decision was not central to the ultimate conclusion that she failed to demonstrate that her condition rendered her unable to perform useful and efficient service. *See Yoshimoto v. Office of Personnel Management*, 109 M.S.P.R. 86, ¶ 18 (2008) (the cause of the condition is not relevant in determining whether an employee is eligible for disability retirement). Additionally, the administrative judge thoroughly discussed the evidence in the initial decision and we see no error in any failure to mention every piece of evidence. *Marques v. Department of Health*

& Human Services, 22 M.S.P.R. 129, 132 (1984) (the administrative judge's failure to mention all of the evidence of record does not mean that he did not consider it in reaching his decision), *aff'd*, 776 F.2d 1062 (Fed. Cir. 1985) (Table). Further, contrary to the appellant's assertion, a failure to comply with recommended treatment may disqualify an individual from receiving retirement disability under current law, but that issue is not material to our decision in this case. PFR File, Tab 1 at 14; *see Wilkey-Marzin v. Office of Personnel Management*, 82 M.S.P.R. 200, ¶ 15 (1999). For these reasons, we deny the petition for review. We modify the initial decision, however, to fully explain our finding that the appellant failed to establish that her medical condition is incompatible with useful and efficient service or retention in the position and to address why the appellant's additional documents on review are not new and material evidence.

The appellant failed to establish that her medical condition is incompatible with useful and efficient service or retention in the position.

¶7 In an appeal from an OPM decision denying a voluntary disability retirement application, the appellant bears the burden of proof by preponderant evidence. *See Chavez v. Office of Personnel Management*, 111 M.S.P.R. 69, ¶ 6, *appeal dismissed*, 363 F. App'x 742 (Fed. Cir. 2009); 5 C.F.R. § 1201.56(a)(2). The relevant question in this case is whether the appellant's medical condition is incompatible with either useful and efficient service or retention in the position. *See Beeler-Smith v. Office of Personnel Management*, 112 M.S.P.R. 479, ¶ 7 (2009). For the following reasons, we find that the medical evidence of record does not establish that the appellant's medical condition is incompatible with either useful and efficient service or retention in her position.

¶8 Dr. Noble diagnosed the appellant with General Anxiety Disorder and Major Depressive Disorder, moderate, single episode. She testified that she was somewhat familiar with the appellant's duties but not the details of her position, and she was unwilling to state that the appellant was unable to perform her duties.

Although there was some indication that the appellant struggled with activities such as housekeeping and shopping, there is no indication to what extent the appellant's condition affected her ability to engage in daily activities. Dr. Noble also testified that the appellant's absence from work placed stress on her family finances, which affected her family relationships, but she did not provide any indication that the appellant's symptoms directly affected her daily interactions with family members. Further, although Dr. Noble testified that the appellant's anxiety disorder is triggered by stress, she did not provide concrete or specific testimony regarding how the appellant's experience of and reaction to stress affect her ability to conduct the duties of her position. *See, e.g.*, *Anderson v. Office of Personnel Management*, 96 M.S.P.R. 299, ¶¶ 14, 20 (2004) (finding the physician's opinions regarding the appellant's disability to be unpersuasive because they did not show how her conditions affect her specific job duties and requirements), *aff'd*, 120 F. App'x 320 (Fed. Cir. 2005).

¶9 Additionally, the administrative judge thoroughly considered each of the documents from Dr. Renick, and we agree with the conclusion that they are sparse and contain summary conclusions regarding the appellant's ability to work that do not demonstrate how her medical condition prevented her from performing her duties. ID at 9-12; *see Anderson*, 96 M.S.P.R. 299, ¶ 20. The Board gives greater deference to medical opinions that are supported by reasoned explanations than it gives to mere conclusory assertions. *Tan-Gatue v. Office of Personnel Management*, 90 M.S.P.R. 116, ¶ 11 (2001). Dr. Renick did not testify at the hearing, and his written opinions regarding the appellant's ability to work are cursory, lacking in detail, and do not appear to be based on an evaluation of the appellant's ability to perform the functions of a rural letter carrier. *See Ancheta v. Office of Personnel Management*, 92 M.S.P.R. 640, ¶ 15 (2002) (the relevant position for determining whether an appellant is entitled to disability retirement is her position of record and whether she is able to perform in that position); *see also Alford v. Office of Personnel Management*, 111 M.S.P.R. 536,

¶¶ 18-19 (2009), *aff'd*, 361 F. App'x 131 (Fed. Cir. 2010); *Hunt v. Office of Personnel Management*, 105 M.S.P.R. 264, ¶¶ 30-31 (2007). Further, as the administrative judge noted, Dr. Renick's reports contain inconsistent information regarding the duration of the appellant's condition and her prognosis for recovery.

¶10 A determination on eligibility for disability retirement must include consideration of the applicant's own subjective evidence of disability and any other evidence of the effect of her condition on her ability to perform in the position she last occupied. *See Chavez*, 111 M.S.P.R. 69, ¶ 7. Here, however, the appellant's testimony was insufficiently detailed to demonstrate that her medical condition prevents her from performing useful and efficient service. She testified generally that she felt she could not return work, but she did not describe how her depression and anxiety affect her ability to perform any of the functions of her position. Moreover, the result of Dr. Noble's diagnostic evaluation suggests that the appellant may have a tendency to exaggerate her symptoms, which casts doubt on the already tenuous link between her medical condition and her ability to perform her job duties. Thus, the appellant has failed to produce sufficient evidence, either subjective or objective, to show that her medical condition is incompatible with useful and efficient service or retention in her position.

The appellant's additional documents on review are not new and material.

¶11 The appellant submits for the first time on review progress reports and clinical notes from Dr. Renick, dating from November 7, 2008, to May 5, 2011. PFR File, Tab 1 at 27-102. Aside from April 21, 2011 and May 5, 2011 progress notes, which we discuss below, these reports were available before the close of the record below, and the appellant has not argued that they were unavailable to her despite her due diligence. *Id.* at 33-37. Under 5 C.F.R. § 1201.115, the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed

despite the party's due diligence. *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

¶12 In the initial decision, the administrative judge noted that the appellant did not produce any treatment notes from Dr. Renick describing the basis for his initial medical diagnosis of the appellant aside from her subjective complaints. ID at 10, 12. On review, the appellant's representative argues that he did not file the complete set of medical documents from Dr. Renick because he believed that the documents submitted below "appeared to be a complete medical basis for the [a]ppellant's claim" and that he did not anticipate having to produce these documents. PFR File, Tab 1 at 6-7. Thus, he argues, the Board should consider these documents to be new evidence. *Id.*

¶13 In rare circumstances, the Board will reopen the record in a retirement appeal to consider documentation that was previously available below because the Board's primary consideration in such appeals is whether the appellant is entitled to the benefits that she seeks. *See, e.g.*, *Matson v. Office of Personnel Management*, 105 M.S.P.R. 547, ¶¶ 15-16, 21 (2007). Such circumstances do not exist here. The appellant was represented below and is represented on review by the same attorney. The administrative judge gave the appellant notice of her burden of proof, including all of the elements necessary to establish her entitlement to disability retirement benefits, and she does not claim that she was misled or lacked notice of the applicable legal standard to prove her case. The administrative judge further specified that the type of evidence to be considered in a disability retirement appeal includes objective clinical findings, diagnoses and medical opinions, and evidence relating to the effect of the appellant's condition on her ability to perform in the grade or class of position last occupied. IAF, Tab 9 at 4. Although we make no finding regarding whether Dr. Renick's notes and reports might have affected the outcome of this case had they been properly submitted below, we find counsel's argument that he was unaware that such documents were necessary to be an insufficient reason for the Board to

consider documents that were available to the appellant prior to the close of the record below.

¶14 We have also considered Dr. Renick's April 21, 2011 and May 5, 2011 reports, which were not available to the appellant prior to the close of the record below, and we find that they do not change the outcome of this appeal. PFR File, Tab 1 at 33-36. Neither report includes material information regarding the appellant's anxiety and depression. In fact, the May 5, 2011 report tends to demonstrate that her symptoms have improved. *Id.* at 33. Further, neither report explains how her medical condition affects her ability to perform the functions of her position. Thus, they are not of sufficient weight to warrant an outcome different from that of the initial decision. *Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980).

¶15 The appellant also submits on review a follow-up report from Dr. Renick that postdates the initial decision. PFR File, Tab 1 at 27-28. In this April 29, 2011 report, Dr. Renick specifically responds to several of the administrative judge's findings. *Id.* He relies upon his previous assessments of the appellant and states that "[his] expressions with regard to her inability to work took into consideration her work duties." *Id.* at 27. He attaches the appellant's job description to the report and states that his familiarity with the appellant's duties and responsibilities were initially developed from discussions with her and have subsequently been confirmed by his review of the attached job description. *Id.* at 27, 29-31. The contents of the April 29, 2011 letter, and Dr. Renick's opinions contained therein, are solely based upon the doctor's previous diagnoses of the appellant from November 7, 2008, through May 26, 2010, which is information that was clearly available prior to the close of the record below. *See Musser v. Office of Personnel Management*, 102 M.S.P.R. 18, ¶ 11 (2006); *Grassell v. Department of Transportation*, 40 M.S.P.R. 554, 564 (1989). The document does not purport to explain any change in circumstance that might warrant a different outcome. Further, this document was created for the specific purpose of

providing information that was available prior to the close of the record below to rebut the explained findings of the administrative judge. An appellant must set forth her strongest case before the administrative judge and support it by the relevant evidence available to her at the time; there is no evidence or claim here that the appellant was somehow prevented from doing so. Additionally, under the circumstances of this case, any assertion that the appellant or her counsel was unaware that particular evidence is relevant to her claim is unpersuasive. Consequently, we find that the April 29, 2011 follow-up report does not constitute new evidence warranting the Board's consideration.

ORDER

¶16 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not

comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

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William D. Spencer
Clerk of the Board
Washington, D.C.